(8)

FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-685

In the Supreme Court of the United States

OCTOBER TERM, 1988

DR. ALAN S. KURITZKY, ET AL., PETITIONERS

v.

BLUE SHIELD OF WESTERN NEW YORK, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

1 pp

TABLE OF AUTHORITIES

Page

Cases:

Bowen v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) 3, 4, 5
Linoz v. *Heckler*, 800 F.2d 871 (9th Cir. 1986) 5
Medical Fund-Philadelphia Geriatric Center v. *Heckler*, 804 F.2d 33 (3d Cir. 1986) 5
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 2, 3, 4, 5

Statutes:

Medicare Act, Tit. XVIII, 42 U.S.C. (& Supp. IV) 1395j-1395w 1
42 U.S.C. 1395*l* 1
42 U.S.C. 1395ff 2
42 U.S.C. 1395rr 2
42 U.S.C. 1395u(a)(1) 1
42 U.S.C. 1395u(b)(3)(C) 2
28 U.S.C. 1331 5

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-685

DR. ALAN S. KURITZKY, ET AL., PETITIONERS

v.

BLUE SHIELD OF WESTERN NEW YORK, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners argue that the court of appeals (Pet. App. 1a-6a) erred in dismissing for lack of subject matter jurisdiction their complaint seeking Medicare payments under Part B of the Medicare Act (42 U.S.C. (& Supp. IV) 1395j-1395w).

1. a. Medicare Part B is a voluntary supplemental insurance program that provides reimbursement for physicians' and various related ancillary services (42 U.S.C. 1395*l*). Private insurance carriers administer Part B benefits under contracts with the Secretary of HHS (42 U.S.C. 1395u(a)(1)). The carrier reimburses Medicare patients, or their providers as assignees, for 80% of the "reasonable charges" for services as determined by the carrier in accordance with the Medicare statute and regulations promulgated by the Secretary (42 U.S.C. 1395*l*). See also Pet. App. 19a-28a (regulations and guidelines used by the carrier in determining the reimbursements at issue in this case).

The Medicare statute provides for "a fair hearing by the carrier" if a dispute arises concerning the amount of reimbursement due a Medicare provider (42 U.S.C. 1395u(b)(3)(C)). During the period pertinent to this dispute,[1] however, the statute did not provide for administrative or judicial review of the carrier's determination as to amounts of reimbursement payable under Medicare Part B. See 42 U.S.C. 1395ff.

b. The End-Stage Renal Disease Program (ESRDP), 42 U.S.C. 1395rr, extends Medicare coverage to individuals with permanent kidney failure who require either dialysis or transplantation. Petitioners are physicians practicing in Western New York (Pet. App. 2a) who allegedly represent all the nephrologists or other physicians in the Western District of New York participating in the ESRDP administered by Blue Shield (*id.* at 9a-10a).

Petitioners complained that the carrier, Blue Shield, misapplied the Medicare regulations and underpaid petitioners for ESRDP services provided before January 1987 (Pet. App. 14a; *id.* at 5a, 12a, 20a-21a, 23a). After a "fair hearing" on this issue, the hearing officer upheld Blue Shield's reimbursement amounts (*id.* at 17a-29a).

c. The district court refused to review the hearing officer's determination. The court characterized petitioner's claim as "nothing more than a request for judicial review of amount determinations under Part B of the Medicare Act" (Pet. App. 12a), and concluded that Section 1395ff barred review under this Court's holding in *United States* v. *Erika, Inc.*, 456 U.S. 201, 206 (1982). The court stated

---

[1] In 1986, Congress amended 42 U.S.C. 1395ff to permit judicial review of certain Part B amount determinations. Those amendments apply only to Medicare services furnished after January 1, 1987, and thus are not relevant to the claims in this case, which were based on services provided before that date. See Pet. App. 4a n.1, 18a, 29a.

that this Court's decision in *Bowen* v. *Michigan Academy of Family Physicians,* 476 U.S. 667 (1986), did not confer jurisdiction, since that decision held reviewable only challenges to "the *Secretary's* regulations and methods" but not challenges to "the *Carrier's* application of those regulations and * * * its final determination * * * " (Pet. App. 13a (emphasis in original)). Because petitioners' complaint did not fall within the category of cases subject to judicial review under *Michigan Academy,* the court concluded that it lacked jurisdiction to entertain petitioners' claims (*id.* at 12a).

d. In a *per curiam* opinion, the court of appeals affirmed (Pet. App. 1a-6a) The court rejected petitioners' contention that "jurisdiction exists [under *Michigan Academy*] because [petitioners] challenge the carrier's 'methods' in calculating benefits" (*id.* at 5a). The court recognized that the term "method" as referred to in *Michigan Academy* "does not mean the carrier's method of applying the regulations, which *Erika* held was unreviewable; rather, it means the method set forth in the Secretary's regulatory scheme that prescribes how the carriers are to calculate benefits" (*id.* at 5a-6a). It is the latter "method," said the court of appeals, that *Michigan Academy* found reviewable (*id.* at 6a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, no further review is warranted.

a. In *United States* v. *Erika,* this Court held that 42 U.S.C. 1395ff, in the version pertinent to this dispute, precludes judicial review of Part B reimbursement determinations. In *Michigan Academy,* this Court carved out a limited exception to that statutory preclusion of review for challenges to the methods prescribed by the Secretary's

regulations, instructions, and policies for calculation of Part B reimbursement.

As both the lower courts correctly found, petitioners' claim falls within *Erika*'s proscription, rather than *Michigan Academy*'s exception. Petitioners challenge the carrier's *application* of the methods for calculating reimbursement set forth in the Secretary's regulations and guidelines, not the regulations and guidelines themselves. As the appeals court recognized, the "methods" that are reviewable under *Michigan Academy* are the methods the Secretary prescribes for implementing the Medicare Act, not the methods used by the carrier in applying the Secretary's guidelines to individual claims for reimbursement. Petitioners themselves acknowledge that their claim below was a challenge to the "method" used by Blue Shield in applying the Secretary's directives and assert that this "method" was "*in violation* of the Act, Regulations and Manual" (Pet. 9).[2]

---

[2] In an effort to avoid *Erika* and take advantage of the reviewability of challenges to the legality of the Secretary's regulations and policies under *Michigan Academy*, petitioners also assert that, if the carrier's reimbursement determinations were consistent with the Secretary's regulations, then the "Act, Regulations and Manual were themselves illegal because they allowed impermissible results" (Pet. 9). Insofar as this assertion goes beyond a restatement of the claim that the carrier misapplied the Secretary's regulations and guidelines, it is at odds with the lower courts' understanding of petitioners' contentions. Although petitioners would have been entitled to judicial review under *Michigan Academy* had they challenged the Secretary's regulations rather than the carrier's application of those regulations, they did not do so. As both courts below understood (Pet. App. 10a; *id.* at 3a), petitioners never maintained that the Secretary's regulations were contrary to law. Rather, they complained that Blue Shield failed to adhere to the regulations and therefore had arrived at inaccurate reimbursement rates. Such a claim of error falls precisely within *Erika*'s ambit.

b. The decisions of the Third and Ninth Circuits cited by petitioners (see Pet. 13-18, 22) correctly applied the teachings of *Michigan Academy* and *Erika* and do not conflict with the appeals court ruling below.

In *Linoz* v. *Heckler,* 800 F.2d 871, 875-876 (9th Cir. 1986), plaintiffs successfully sought judicial review of their claim that a provision in the carrier's manual was invalid because improperly promulgated by the Secretary. *Linoz* is thus readily distinguishable from the instant case, since petitioners here do not contend that the Secretary's pertinent guidelines are illegal, but only that they were improperly applied.

In *Medical Fund-Philadelphia Geriatric Center* v. *Heckler,* 804 F.2d 33, 36-39 (3d Cir. 1986), the appeals court reviewed the district court's dismissal of plaintiffs' claim for lack of subject matter jurisdiction. The court remanded in light of the intervening decision in *Michigan Academy* to allow the plaintiffs to allege jurisdiction under 28 U.S.C. 1331 over their claim that an express HCFA policy was contrary to statute. However, the court acknowledged that "plaintiff[s'] * * * allegation that the HFCA *erroneously applied* its own policy * * * would be * * * precluded from judicial review" (804 F.2d at 39 (emphasis added)). Thus, the Third Circuit adhered to the distinction, recognized by the court of appeals here, between a claim that the Secretary's policy is unlawful—which is reviewable—and a claim that a policy is erroneously applied—which is not.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—241 699 60780